89-1640
NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1989

TERRY RAY SLUDER and
TINA SLUDER,

Petitioners,

versus

UNITED MINE WORKERS OF AMERICA,
INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA,
DISTRICT 12,
JOHN DOE, and
TOM ROE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The sole question presented for review on this petition for writ of certiorari is whether the District Court and the Court of Appeals in affirming the District Court erred in dismissing Counts I and II of the Sluders' Complaint against Sluder's Union as preempted by Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185, where Counts I and II alleged a state law negligence claim for personal injuries arising out of the Union's breach of common law duties of care assumed and undertaken by the Union when the Union performed a safety inspection of the coal mining facility where Sluder worked.

LIST OF ALL PARTIES TO THE PROCEEDING

1. Terry Ray Sluder (Plaintiff)
2. Tina Sluder (Plaintiff)
3. United Mine Workers of America, International Union (Defendant)
4. United Mine Workers of America, District 12 (Defendant)
5. John Doe (Defendant)
6. Tom Roe (Defendant)
7. AMAX Coal Company (Third-Party Defendant)

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IN THE
SUPREME COURT OF THE UNITED STATES
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TERRY RAY SLUDER and
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UNITED MINE WORKERS OF AMERICA,
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DISTRICT 12,
JOHN DOE, and
TOM ROE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Terry Ray Sluder and Tina Sluder, by counsel, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in these proceedings on December 22, 1989.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit, published at 892 F.2d 549, is reproduced as Appendix "A" hereto.

The unpublished final Judgment Entry of the United States District Court for the Central District of Illinois, Springfield Division, entered in these proceedings on August 30, 1988 is reproduced as Appendix "B" hereto.

The unpublished Order Adopting Magistrate's Recommendations entered by the District Court on March 7, 1988 in these proceedings is reproduced as Appendix "C" hereto.

The unpublished Recommendation of the Magistrate submitted on February 18, 1988 in these proceedings and adopted by the District Court is reproduced as Appendix "D" hereto.

JURISDICTION

The judgment and opinion of the Court of Appeals in these proceedings was entered on December 22, 1989.

Upon timely Application filed herein by counsel for Petitioners, the Honorable John Paul Stevens, Associate Justice of this Court and Circuit Justice for the Seventh Circuit, issued an Order on March 13, 1990 extending the time for filing this Petition for Writ of Certiorari to and including April 21, 1990.

The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The statute involved in this case is Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185, the full text of which is reproduced as Appendix "E" hereto. For purposes of clarity in this Petition for Writ of Certiorari, the Labor Management Relations Act of 1947 is referred to herein simply as the "LMRA," and Section 301 thereof is referred to herein simply as "Section 301."

STATEMENT OF THE CASE

For purposes of clarity in this Petition for Writ of Certiorari, the Petitioners Terry Ray Sluder and Tina Sluder are referred to simply as the "Sluders," unless otherwise indicated. When reference to Terry Sluder alone is appropriate, he is referred to simply as "Sluder," unless otherwise indicated. Likewise, the Respondents United Mine Workers of America, District 12, and United Mine Workers of America, International Union, are referred to simply as the "Unions," unless otherwise indicated. When reference to United Mine Workers of America, District 12, alone is appropriate, it is referred to simply as the "Union," unless otherwise indicated. When distinction between the United Mine Workers of America, District 12, and the United Mine Workers of America, International Union, is appropriate, the former is referred to simply as the "Local Union" and the latter is referred to simply as the "International Union," unless otherwise indicated.

Terry Sluder and his wife Tina Sluder are citizens of the State of Indiana, residing in Sullivan County, Indiana. At the time of the events complained of, Terry Sluder was a coal miner employed by AMAX Coal Company at its coal mining facility at the Wabash Mine in Keensburg, Illinois. As a coal miner, he was a member of both the Local Union and the International Union, both of whom have offices in Springfield, Illinois. At the time of the events complained of, there was a collective bargaining agreement in effect between Sluder's employer and the Unions.

On July 31, 1986, and on occasions prior thereto, the Union, through its agents, undertook to make safety inspections at the mining facility where Sluder was working. Those inspections included, although were not limited to, checking for proper placement of rib bolts in the mine. (Rib bolts, as the name implies, are devices secured to the walls of an underground coal mine to provide structural support in order to prevent the mine walls from collapsing.) On the morning of July 31, 1986, the Union, through

its agents, made such an inspection in the area of the mine where Sluder was working. Moments after the inspection, and while the inspectors were still in the general area, the mine wall where Sluder was working collapsed onto him. The cause of the collapse was the complete absence of any rib bolts in that part of the mine wall which collapsed onto Sluder. The inspection undertaken only moments before failed to detect this absence of rib bolts.

As the result of the mine wall collapsing onto Sluder, he sustained a broken back and was rendered paralyzed.

This is an action by the Sluders against the Unions and their agents for damages resulting from the personal injuries sustained by Sluder. On November 24, 1986, the Sluders filed their Complaint against the Union and its agents John Doe and Tom Roe in the Circuit Court of Sangamon County, Illinois under Cause No. 86-L-464. Count I alleged a state law negligence claim; that the Union, by and through its agents John Doe and Tom Roe, undertook to make safety inspections of the coal mine where Sluder worked and, having so undertaken such inspections, assumed and became subject to the state common law duty to perform these inspections with due care; and that their negligence in performing such inspections resulted in the collapse of the mine wall, causing serious personal injuries to Sluder. Count II alleged a loss of services, society, companionship and consortium by Sluder's wife Tina Sluder.

On January 26, 1987, the Sluders filed their Motion for Leave to Amend and proposed Amended Complaint in Cause No. 86-L-464. Their Amended Complaint restated Counts I and II of their original Complaint verbatim, and added a new Count III against both Unions. Count III alleged a claim for breach of the Union's duty of fair and adequate representation to Sluder, as a union member, under Section 301 by both Unions in failing to perform and enforce certain provisions of the collective bargaining agreement between them and Sluder's employer AMAX Coal Company.

Because of the approaching 180-day statutory deadline for filing such a Section 301 action as set forth in Count III, and the failure of the Circuit Court of Sangamon County, Illinois to rule on the Sluders' Motion for Leave to Amend their original Complaint to add Count III in Cause No. 86-L-464, the Sluders filed another Complaint in the Circuit Court of Sangamon County, Illinois under Cause No. 87-L-32 on January 27, 1987. This second Complaint filed under Cause No. 87-L-32 was identical to the Amended Complaint filed under Cause No. 86-L-464. This Complaint is reproduced as Appendix "F" hereto.

The District Court acquired jurisdiction in this proceeding on February 25, 1987, when the Unions filed their Petition for Removal of both of said state court actions in the United States District Court for the Central District of Illinois, Springfield Division, along with a removal bond, and filed its Notice of Removal in the Circuit Court of Sangamon County, Illinois. The basis for removal alleged in the Petition for Removal of the Union was:

> 3. . . . Count III of the Complaints specifically alleges that Petitioners have failed to represent Plaintiff Terry Sluder in their capacity as exclusive bargaining representatives. The first two Counts of the Complaints naming only United Mine Workers of America District 12 and the unknown defendants allege certain injuries resulted to both Plaintiffs as a result of Petitioner's alleged negligent performance of duties pursuant to the collective bargaining agreement.
>
> 4. Said Complaints arise under Section 185 of Chapter 29 of the United States Code, a claim thereby arising under the laws of the United States which may be removed pursuant to Chapter 28 United States Code 1441(b).

In his Recommendation, adopted by the District Court, the Magistrate reviewed the removal jurisdiction of the District Court and found that the Sluders' Complaint "artfully pled" a federal case couched in terms of state law which sought to avoid the preemptive scope of Section 301, concluding that the Complaints were properly removable as arising under federal law, namely, Section 301.

While the Sluders concede that Count III of their Complaints on its face presented a federal question over which a federal district court would have concurrent original jurisdiction under 28 U.S.C. §1331, *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962), the Sluders dispute the District Court's original jurisdiction over Counts I and II of their Complaint standing alone, because said Counts alleged state law causes of action. Conceding that Count III of their Complaints presented a federal question, nevertheless, the Sluders acknowledge that the District Court could have exercised jurisdiction over Counts I and II of their Complaints upon removal under principles of pendent jurisdiction. *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966).

On March 3, 1987, the International Union filed its Motion to Dismiss Count III of Sluder's Complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. On March 17, 1987, the Local Union filed its Motion to Dismiss all three Counts of the Sluders' Complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Procedure. Both Motions to Dismiss were filed (and ruled upon) before any Answer was filed by either of the Unions, and neither Motion to Dismiss placed before the Court any matters outside the Sluders' Complaint which would, under Rule 12(b) of the Federal Rules of Civil Procedure, permit those Motions to be treated as motions for summary judgment and disposed of as provided in Rule 56 of the Federal Rules of Civil Procedure. After the filing of briefs and submissions of legal authorities but before any discovery, the Honorable Charles H. Evans, Magistrate, made his Recommendation

on February 17, 1988, submitting that Counts I and II of the Sluders' Complaint be dismissed as preempted by Section 301, and that Count III not be dismissed. On February 26, 1988, the Sluders filed their Objection to Magistrate's Recommendation. On March 7, 1988, the Honorable Richard Mills, Judge, made his Order Adopting Magistrate's Recommendations, thereby dismissing Counts I and II of the Sluders' Complaint as preempted by Section 301.

On April 6, 1988, the Sluders filed their Motion in the Alternative to make said Order final under Rule 54(b) of the Federal Rules of Civil Procedure for purposes of appeal, or to amend said Order to conform to 28 U.S.C. §1292(b) to permit a discretionary interlocutory appeal. In order to proceed with an immediate appeal of the dismissal of Counts I and II of their Complaint as preempted by Section 301, the Sluders filed their Motion to Dismiss Count III and for Entry of Final Judgment on August 30, 1988. On that date, the District Court made its final Judgment Entry, dismissing Count III of the Sluders' Complaint and making final the District Court's March 7, 1988 Order Adopting Magistrate's Recommendations which dismissed Counts I and II as preempted by Section 301.

The United States Court of Appeals for the Seventh Circuit acquired jurisdiction in this proceeding on September 27, 1988, when the Sluders filed their Notice of Appeal. Following briefing and oral argument, the Court of Appeals rendered its judgment and opinion on December 22, 1989.

ARGUMENT

COUNT III OF THE COMPLAINT ALLEGED A CLAIM FOR BREACH OF THE UNIONS' DUTY OF FAIR REPRESENTATION UNDER SECTION 301 AS AN ALTERNATIVE THEORY OF RECOVERY TO THAT ALLEGED IN COUNTS I AND II

Rule 81(c) of the Federal Rules of Civil Procedure provides, in pertinent part:

> *Removed Actions.* These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal.

Under this Rule, these proceedings became subject to the Federal Rules of Civil Procedure upon removal to the District Court from the state court on February 25, 1987.

Rule 8(e)(2) of the Federal Rules of Civil Procedure provides, in pertinent part:

> A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. . . . A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds.

Count III of Sluder's Complaint alleged an alternative theory of recovery to that alleged in Counts I and II. Count III of the Complaint on its face alleged a claim for breach of the Unions' duty of fair and adequate representation under Section 301; Counts I and II, however, plainly attempted to allege the common law negligence of the Union in the performance of separate and independent duties which arose under Illinois state law without any reference to duties arising under the collective bargaining agreement or as a matter of federal labor law. This was pointed out to the District Court in the Sluders' Objection to Magistrate's Recommendation filed before the District Court's Order Adopting Magistrate's Recommendations.

It is submitted that the District Court read Count III of the Complaint into Counts I and II in characterizing Counts I and II as "artfully pled Section 301 claims," and thus preempted by federal law. This is supported by the recommended Order of the Magistrate, adopted by the District Court, which allowed the Sluders thirty days to amend Counts I and II, presumably to state a cause of action under Section 301.

Courts have recognized that, pursuant to Rule 8(e)(2) of the Federal Rules of Civil Procedure, a plaintiff may allege alternative and even inconsistent theories of recovery in its complaint. *Reconstruction Finance Corp. v. Goldberg*, 143 F.2d 752 (7th Cir.), *cert. denied*, 323 U.S. 770, *reh'g denied*, 323 U.S. 817 (1944). It has also been held that it was error for a trial court to require a plaintiff to make an election between two alternative theories of recovery alleged in its complaint, and to amend its complaint to allege only one theory. *Berry Refining Co. v. Salemi*, 353 F.2d 721 (7th Cir. 1965).

Both Unions filed Motions to Dismiss Count III that were virtually identical. Neither Motion to Dismiss disputed that Count III alleged a Section 301 action for breach of duty of fair representation, although both Motions challenged the sufficiency of Court III arguing that the allegations of Count III were merely conclusory and that Count III did not allege any "intentional" act or failure to act. In his Memorandum in Opposition to these Motions to Dismiss Count III, Sluder again reaffirmed that Count III alleged a Section 301 action for breach of duty of fair and adequate representation.

An additional ground for dismissal of Count III advanced by the Unions was that the contractual provisions of the collective bargaining agreement alleged in Count III did not expressly or impliedly create the duties to Sluder alleged to have been breached. It is noteworthy that both Unions vehemently denied that the collective bargaining agreement created any of the duties alleged in

Count III, and extensively briefed that issue, relying primarily upon *Bryant v. United Mine Workers,* 467 F.2d 1 (6th Cir. 1972), *cert. denied,* 410 U.S. 910 (1973), and *McColgan v. United Mine Workers,* 124 Ill.App.3d 825, 464 N.E.2d 1166 (1984), *cert. denied,* 470 U.S. 1051 (1985). Even the Answers subsequently filed by both Unions denied that the duties alleged in Count III arose under the collective bargaining agreement. This is significant because if, as so urgently advanced by the Unions, the duties alleged in Count III of Sluder's Complaint were not the subject of the collective bargaining agreement and therefore outside the preemptive scope of Section 301 and federal labor law, then it is difficult to perceive how the Unions can argue that the common law duties arising under Illinois state law (as alleged in Counts I and II) are "inextricably intertwined with consideration of the terms" of that collective bargaining agreement and swept within the preemptive scope of Section 301.

It is also important to note that the Magistrate's Recommendation, adopted by the District Court, denying the Unions' Motion to Dismiss Count III did not address this last issue of whether or not any of the duties alleged in Count III even existed under the collective bargaining agreement. The Magistrate's Recommendation only went so far as to say that "[i]t certainly cannot be said that under Rule 12(b)(6) it appears beyond doubt to a certainty that plaintiffs can prove not set of facts in support of their claims which would entitle them to relief."

After due consideration, Sluder dismissed Count III of his Complaint, leaving only the alternative state law theory of recovery alleged in Counts I and II.[1]

---

[1] Contrary to the inference drawn by the Court of Appeals in its opinion, the Sluders did not dismiss Count III solely as a "strategic decision," 892 F.2d at 551, n.3, or a "tactical maneuver," *Id.* at 556. Rather, after a careful review of the evidence available to the Sluders at the time, it was concluded that Sluder would be unlikely to prevail on his Section 301 claim against the Unions. This Court has held that the duty of fair representation under Section 301 is breached only when the conduct of a union toward its member is arbitrary, discriminatory or in bad faith.

COUNTS I AND II OF THE COMPLAINT ALLEGED A STATE LAW NEGLIGENCE CLAIM FOR BREACH OF A STATE COMMON LAW DUTY ASSUMED AND UNDERTAKEN BY THE UNION WHICH DID NOT ARISE UNDER THE COLLECTIVE BARGAINING AGREEMENT

As is plainly evident from even a cursory review of Counts I and II of the Sluders' Complaint, those Counts very simply and directly attempted to allege the common law negligence arising under Illinois state law of the Union in the performance of duties which the Union undertook and assumed. Counts I and II very clearly do *not* allege that the Union's duties arose under a collective bargaining agreement. Quite to the contrary, Counts I and II allege that the Union's duties to Sluder arose as a matter of law only *after* the Union undertook and assumed those duties.

The basis in Illinois state law for the theory of recovery advanced under Counts I and II was the subject of the opinion of the Illinois Supreme Court in *Nelson v. Union Wire Rope Corp.*, 31 Ill.2d 69, 199 N.E.2d 769 (1964). There, the Illinois Supreme Court observed:

> Originating with the decision of Coggs v. Bernard, 2 Lord Raymond 909, it has come to be a recognized principle that liability can arise from the negligent performance of a voluntary undertaking. In our times a clear and oft-cited statement of the principle is the language of Justice

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Vaca v. Sipes, 386 U.S. 171 (1967); *Humphrey v. Moore*, 375 U.S. 335 (1964). The weight of the evidence available to Sluder suggested that, although the Union's conduct was clearly negligent, there was simply not sufficient evidence to prevail in proving that the Unions' conduct was arbitrary, discriminatory or in bad faith. "Due care" has not been incorporated into a union's duty of fair representation under Section 301, and mere negligence has never been recognized by this Court to constitute a breach of union's duty of fair representation under Section 301.

> Cardozo in Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275, 276, 23 A.L.R. 1425, when he said: "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." (See also: 38 Am.Jur., Neg. sec. 17; 5 Harvard Law Review 222.) Florida, like Illinois, has recognized the doctrine. (Banfield v. Addington, 104 Fla. 661, 140 So. 893, 896; United States v. Lawter (5th cir.), 219 F.2d 559; United States v. DeVane (5th cir.), 306 F.2d 182; Triolo v. Frisella, 3 Ill.App.2d 200, 121 N.E.2d 49) In addition, Florida has frequently stated that it will adhere to the views of the Restatement of Torts, (Propper v. Kesner (Fla. 1958) 104 So.2d 1; Tampa Drug Co. v. Wait (Fla. 1958), 103 So.2d 603, 75 A.L.R.2d 765; Matthews v. Lawnlite Co. (Fla. 1958), 88 So.2d 299,) where the doctrine is stated in this manner: "(1) One who gratuitously renders service to another, * * * is subject to liability for bodily harm caused to the other by his failure, while so doing, to exercise such competence and skill as he possesses." §323(1)

31 Ill.2d at 74, 199 N.E.2d at 773-74. The Court went on to state:

> [P]laintiffs, to support their actions, had only to show (1) that defendant undertook to make safety inspections and to render safety engineering services under circumstances which created a duty on defendant, owed to plaintiffs, to perform its undertakings with due care, and (2) that the gratuitous undertakings were negligently performed, such negligence resulting proximately in plaintiffs deaths and injuries. See also: McClure v. Hoopeston Gas and Electric Co., 303 Ill. 89, 96, 135 N.E. 43, 25 A.L.R. 250; Devaney v. Otis Elevator Co., 251 Ill. 28, 33, 95 N.E. 990.

Id. at 75, 199 N.E.2d at 774. The Court then held, in disposing of a defense anticipated in the present case, that:

> Defendant's duty here did not arise by virtue of its control, or right to control, the equipment, and neither did it arise as a result of any relationship with [plaintiff's employer] Auchter or its employees. The duty arose, rather, by operation of law from defendant's own independent and gratuitous course of conduct.

Id. at 84, 199 N.E.2d at 779. Finally, in disposing of another defense anticipated in the present case, the Court held:

> [D]efendant also injects a contention that it could be liable to Plaintiffs only if it had assumed entirely [the employer] Auchter's duty of inspecting the hoist and cable. We do not find, however, that such a condition attaches to the liability of one gratuitously making safety inspections.

Id. at 87-88, 199 N.E.2d at 780.

In the context of discussing this universal principle that liability can arise from the negligent performance of a duty undertaken and assumed, the Illinois Supreme Court has also held that the scope of the duty so assumed is determined by the extent of the undertaking. *Pippin v. Chicago Housing Authority*, 78 Ill.2d 204, 399 N.E.2d 596 (1979).

In its opinion in the present case, the Court of Appeals acknowledged the vitality of these principles of Illinois state law. 892 F.2d at 553-54. Under these principles, it is clear that Counts I and II of the Sluders' Complaint set forth a cause of action against the Union for common law negligence arising under Illinois state law in the performance of duties which the Union undertook and

assumed in performing the safety inspection. Nowhere in Counts I and II was it alleged that the duties alleged to have been breached by the Union arose under or by virtue of the collective bargaining agreement. Those duties were alleged to have arisen by operation of law after the Union had already undertaken and assumed those duties. Put another way, those duties would have arisen and existed by operation of law whether or not any collective bargaining agreement even existed at all. Thus, reference to the collective bargaining agreement is both unnecessary and improper in determining the scope of the duties alleged in Counts I and II. Rather, the scope of the duties assumed by the Union is determined by the extent of the *actual* undertaking by the Union.

In his Recommendation to dismiss Counts I and II as preempted by Section 301, the Magistrate in the present case cited a brief passage from an earlier Memorandum filed on behalf of the Sluders as establishing that the duties alleged in Counts I and II arose from obligations devolved by the collective bargaining agreement:

> [T]he Complaint alleges that this Defendant failed to report the unsafe condition, failed to warn Plaintiff Terry Sluder and failed to close the mining facility, all of which it was legally and *contractually obligated* to do. . . . Even assuming, arguendo, that the inspection that the union did perform before the mine collapsed was "voluntary" as opposed to mandatory, once undertaken, *the collective bargaining agreement required it to warn plaintiff Terry Sluder, to report the safety violation and to close the mine*. Thus, the scope of the duty is clearly defined.

(emphasis supplied by Magistrate). Any misunderstanding as to the basis of the duties alleged in Counts I and II resulting from this misspoken passage from that early Memorandum was rectified and cleared up by the subse-

quent Response filed on behalf of the Sluders *before* the Magistrate made his Recommendation.

In addition, lest there be any doubt as to the position of the Sluders in the District Court, the Sluders' Objection to Magistrate's Recommendation made it crystal clear that:

> Counts I and II of Plaintiffs' Complaint are *not* premised upon duties or obligations arising out of the collective bargaining agreement. . . . Counts I and II of Plaintiffs' Complaint do *not in any way rely* upon the collective bargaining agreement. . . . Counts I and II of Plaintiffs' Complaint allege very simply and directly the common law negligence of Defendant in the performance of duties which existed separately and independently under the common law, without any reference to duties arising under the collective bargaining agreement.

(emphasis original). The Sluders' Objection to Magistrate's Recommendation was filed before the District Court made its Order Adopting Magistrate's Recommendations.

The foregoing was pointed out and underscored in the Sluders' briefs filed in the Court of Appeals in this proceeding. The Court of Appeals, however, appears to have overlooked or ignored same in its quotation of the misspoken passage in the Magistrate's Recommendation. 892 F.2d at 552, n.5.

In its opinion in this case, the Court of Appeals also singled out one allegation of the Sluders' Complaint, that the Union "[c]arelessly and negligently failed to close said mining facility in light of its unreasonably dangerous condition," to support its holding that reference to the collective bargaining agreement was necessary to determine the scope of the Union's duties. 892 F.2d at 554. In focusing on

this single allegation, the Court of Appeals appears to have overlooked or ignored several other allegations of the Sluders' Complaint, that the Union:

> a.) Carelessly and negligently failed to detect the lack of proper placement of rib bolts in said coal mining facility;
>
> b.) Carelessly and negligently failed to report the absence of rib bolts to the proper authorities;
>
> c.) Carelessly and negligently failed to warn Plaintiff Terry Ray Sluder of the absence of said rib bolts and the imminent danger to himself caused thereby;

No reference to any collective bargaining agreement is necessary or appropriate in evaluating these claims.

It is the fair and substantive import of the allegations of Counts I and II themselves, and not their mischaracterization, which must control. Rule 8(f) of the Federal Rules of Civil Procedure provides:

> *Construction of Pleadings.* All pleadings shall be so construed as to do substantial justice.

COUNTS I AND II OF THE COMPLAINT WERE NOT PREEMPTED BY SECTION 301

In its last four terms, this Court has rendered four decisions addressed to the preemptive scope of Section 301: *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *IBEW v. Hechler*, 481 U.S. 851 (1987); *Caterpiller v. Williams*, 482

U.S. 386 (1987); and, *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399 (1988). In affirming the District Court, the Court of Appeals in the present case erroneously held that Counts I and II of the Sluders' Complaint were preempted by Section 301. In so holding, the Court of Appeals decided an important question of federal law in a way that conflicts with the foregoing decisions of this Court. In so holding, the Court of Appeals also decided a federal question in a way that conflicts with a decision of a state court of last resort.

In *Rawson v. United Steelworkers*, 115 Idaho 785, 770 P.2d 794 (1988), *cert. granted*, _____ U.S. _____, 110 S.Ct. 714 (1990), the Idaho Supreme Court addressed the same issue, on nearly identical facts, and reached the opposite conclusion reached by the Court of Appeals in the present case. The Court of Appeals in the present case acknowledged the decision of the Idaho Supreme Court in *Rawson*, but refused to follow it. 892 F.2d at 555, n.9.

In the present case, the Court of Appeals relied heavily upon the decision of this Court in *IBEW v. Hechler*, 481 U.S. 851 (1987), noting, "[i]ndeed, our situation is not at all dissimilar from that facing the Supreme Court" in *Hechler*. 892 F.2d at 555. Since the decision of the Idaho Supreme Court in *Rawson* was issued on remand from this Court "for further consideration in light of" *Hechler*, 482 U.S. 901, *Rawson* is particularly instructive in that regard. In *Rawson*, the Idaho Supreme Court carefully and logically distinguished *Hechler*. Because of the obvious similarities between *Rawson* and the present case, those distinctions have equal application in the present case.

In *Rawson*, the Idaho Supreme Court observed:

> In *Hechler, supra*, the court had before it a substantially different issue than that presented herein.
>
> * * *

> In the instant case we are not concerned with imposing a duty on the Union to provide a safe work place. Rather, the issue here is whether the LMRA preempted prosecution of a tort action where the activity was concededly undertaken and the standard of care is imposed by state law without reference to the collective bargaining agreement.

115 Idaho at 786, 770 P.2d at 795.

The Idaho Supreme Court then further distinguished *Hechler:*

> In the instant case we are not faced with looking at the Collective Bargaining Agreement to determine whether it imposes some new duty upon the union—rather it is conceded the union undertook to inspect and, thus, the issue is solely whether that inspection was negligently performed under traditional Idaho tort law.
>
> * * *
>
> In the instant case there is no need to look to the agreement to discern whether it placed an "implied duty" on the union or whether the duty "extended to the particular responsibilities alleged" because here the parties concede the union did actively undertake the subject inspection duties. The only question is whether duties clearly undertaken were performed negligently.

Id. at 787, 770 P.2d at 796.

Finally, *Hechler* is most easily distinguished on the basis of its limited holding. In *Hechler,* this Court first quoted the allegations of the Plaintiff's complaint, "that

'pursuant to contracts and agreements entered into by and between' the Union and [plaintiff's employer] Florida Power, and 'pursuant to the relationship by and between' the Union and respondent, the Union had a duty to ensure that respondent 'was provided safety in her work place and a safe place to work,' and to ensure that respondent 'would not be required or allowed to take undue risks in the performance of her duties which were not commensurate with her training and experience.' " 481 U.S. at 853. Clearly, as observed by this Court, the plaintiff's complaint alleged that the union had "assumed this duty under the *collective bargaining agreement.*" *Id.* at 861 (emphasis added). In a lengthy footnote, this Court further noted that, because the plaintiff had alleged and characterized the union's duty of care as grounded in the collective bargaining agreement throughout the proceeding below, she had waived and abandoned the argument made for the first time on certiorari that the union was subject to an independent state law duty of care unconnected to the collective bargaining agreement. *Id.* at 862-65, n.5.

It is in this regard that *Hechler* is most readily distinguishable from the present case before this Court. In *Hechler*, the plaintiff's complaint plainly alleged that the union's duties arose from the collective bargaining agreement itself. In the present case before this Court, Counts I and II of the Sluders' Complaint did *not* allege that any duties of the Union to Sluder arose from the collective bargaining agreement or any other contract or agreement. Rather, the duties alleged in Counts I and II arose by operation of state law after the Union actually undertook and assumed those duties.

In *Rawson*, the Idaho Supreme Court noted the same obvious distinction:

> Thus, the instant case is clearly distinguishable from *Hechler* in that here the state tort basis of the action was not abandoned, but has

> been pursued consistently both at the trial and appellate levels and the tort exists without reference to the collective bargaining agreement.

115 Idaho at 787-88, 770 P.2d at 796-97.

Both in the District Court and in the Court of Appeals, the Union argued that only through a collective bargaining agreement could it assume the duties alleged in Counts I and II of the Sluders' Complaint: "Under common law, it is the employer's duty to provide a safe workplace; it is only by contract that a third party such as District 12 here assumes any responsibility with respect to safety." This argument misses the distinction between contractual liability under a collective bargaining agreement and independent tort liability under state law. While it may be only by contract that a third party such as the Union may assume any *contractual* liability with respect to safety, independent state tort law provides that a third party, union or otherwise, may assume *tort* liability with respect to safety as a result of its own conduct.

This argument by the Union is analogous to the unsuccessful argument made in *Caterpiller v. Williams*, 482 U.S. 386 (1987). There, this Court observed:

> Caterpiller's basic error is its failure to recognize that a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective bargaining agreement.

482 U.S. at 396 (emphasis original). This Court further explained in a footnote:

> Section 301 does not, as Caterpiller suggests require that all "employment-related matters involving unionized employees" be resolved through collective bargaining and thus be governed by a federal common law created by §301. Brief for Petitioners at 26. The Court has stated that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by §301 or other provisions of the federal labor law." *Allis-Chalmers*, 471 U.S. 202, 211, 105 S.Ct. 1904, 1911, 85 L.Ed.2d 206 (1985). Claims bearing no relationship to a collective-bargaining agreement beyond the fact that they are asserted by an individual covered by such an agreement are simply not preempted by §301.

Id. at 396, n.10.

In support of its argument, the Union relied upon a decision of the Illinois Court of Appeals, *McColgan v. United Mine Workers*, 124 Ill.App.3d 825, 464 N.E.2d 1166 (1984). In *McColgan*, as in *Hechler*, the only duties alleged by the plaintiffs to have been undertaken by the union were those alleged to have been undertaken by the union contractually: "Plaintiffs point to the unions' constitution and by-laws as well as the collective bargaining agreement to indicate that defendants voluntarily undertook responsibility for safety conditions." *Id.* at 827, 464 N.E.2d at 1168.

The holding of the Illinois Court of Appeals in *McColgan* is virtually identical to, and goes no further than, the holding of this Court in *Hechler*. In both cases, the respective Courts merely held that employee claims against unions based upon duties arising contractually under a collective bargaining agreement are preempted. Neither case holds or even suggests that the *only* way a union may undertake a duty to its employee members is contractually through a collective bargaining agreement.

In relying upon *McColgan*, the Union here simply ignored the distinction recognized in *Caterpiller* and *Hechler* between claims alleged to arise from duties under a collective bargaining agreement and claims alleged to arise independently under state law without reference to any collective bargaining agreement. Thus, the decision of the Illinois Court of Appeals in *McColgan*, when analyzed in light of these decisions of this Court, is not contrary to the position advanced by the Sluders in this case, but rather is fully consistent with and supports the arguments of the Sluders in this case.

The Union also failed or refused to acknowledge a critical distinction between the allegations of the plaintiff's complaint in *McColgan*, and the allegations of Counts I and II of the Sluders' Complaint in the present case. In *McColgan*, the Court observed:

> Plaintiffs allege neither failure to inspect *nor failure to exercise reasonable care during inspection*. Indeed, while plaintiffs characterize defendants' duty as a duty to "monitor" and correct unsafe conditions, *plaintiffs make no attempt to connect monitoring or inspection to this occurrence*. Rather, it appears that an inspection, negligent or otherwise, would have revealed no more than was already known.

124 Ill.App.3d at 828, 464 N.E.2d at 1168 (emphasis added).

In *McColgan*, the plaintiffs alleged that by the act of entering into a collective bargaining agreement the union *generally* undertook a contractual duty to monitor and correct unsafe conditions. However, the plaintiffs failed to allege any *specific* undertaking of the union, other than this vague contractual undertaking, or any direct and proximate connection between the plaintiffs' injuries and any specific failure of the union in its undertaking. In the

present case before this Court, Counts I and II of the Sluders' Complaint alleged a specific undertaking by the Union giving rise to state common law duties: the Union, by its agents, specifically undertook a safety inspection on July 31, 1986. (No duty, contractual or otherwise, to initially undertake the inspection was alleged.) Once having undertaken that safety inspection, the failure of the Union to exercise reasonable care during that inspection in detecting the absence of rib bolts directly and proximately resulted in Sluder's injuries. Clearly, Sluder's injuries are directly "connected" to a *specific* "failure to exercise reasonable care during inspections," which inspections if property performed "would have revealed . . . more than was already known." *Id.*

In the present case, the Union *did* inspect the mine, and the Sluders allege *not* that the Union failed to inspect (whether such a duty arose under the collective bargaining agreement or not), but rather that the Union actually performed the inspection which it undertook in a negligent manner and failed to warn Sluder of a life-threatening safety hazard, the duty to warn necessarily flowing from the act of inspection, not from any collective bargaining agreement.

The scope of the duty assumed by the Union to Sluder is determined by the extent of the undertaking. By way of example, the Union's duties to Sluder might be significantly different if the safety inspection were limited only to checking to make sure that all miners were wearing hard hats than it would be if the safety inspection encompassed checking for proper placement of rib bolts. The determination of the extent of the Union's undertaking and the corresponding duty assumed towards Sluder is a factual inquiry, depending upon what *actually* took place during the inspection on July 31, 1986. No reference to any collective bargaining agreement is necessary or appropriate to this purely factual inquiry.

In *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399 (1988), this Court observed that when resolution of a state law tort claim turns on such purely factual inquiries into the conduct of the parties, the state law claim is independent of the collective bargaining agreement and is not preempted by Section 301:

> "[T]o show retaliatory discharge, the plaintiff must set forth sufficient facts from which it can be inferred that (1) he was discharged or threatened with discharge and (2) the employer's motive in discharging or threatening to discharge him was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights." . . . Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement. . . . Thus, the state-law remedy in this case is "independent" of the collective-bargaining agreement in the sense of "independent" that matters for §301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement.

486 U.S. at 407.

This Court's decision in *Lingle* is further significant to the present case in that this Court recognized that the assertion of Sluder's Section 301 claim in Court III does not preclude or preempt his assertion of independent state law claims in Counts I and II, even if the resolution of those claims would involve an analysis of precisely the same set of facts:

> We agree with the Court's explanation that the state-law analysis might well involve attention to the same factual considerations as the contractual determination of whether Lingle was fired for just cause. But we disagree with the Court's conclusion that such parallelism renders the state-law analysis dependent upon the contractual analysis. For while there may be instances in which the National Labor Relations Act pre-empts state law on the basis of the subject matter of the law in question, §301 pre-emption merely insures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements. In other words, even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for §301 pre-emption purposes.

Id. at 408-10.

This latter aspect of this Court's decision in *Lingle* appears to have been overlooked or ignored by the Court of Appeals. Because the Court of Appeals did not acknowledge the independence of Counts I and II of the Sluders' Complaint, the Court affirmed the District Court's characterization of Counts I and II as "artfully pled" claims under Section 301. However, under this Court's analysis in *Lingle*, even if some or all of the duties alleged in Counts I and II were in fact owed to Sluder by the Union under the collective bargaining agreement (which was *not* alleged in Counts I and II), those Counts would still not be preempted by Section 301 as long as those claims were alleged to and

did in fact arise from independent state law duties which did not require reference to a collective bargaining agreement for determination. As noted by this Court in *Caterpillar*, even though an employee may have substantial rights under a collective bargaining agreement and could bring suit under Section 301, he is free as master of his complaint not to do so, and instead to bring suit under state law. 482 U.S. at 394-95. This is precisely what the Sluders attempted to do in Counts I and II of their Complaint. The duties and liabilities of the Union alleged in Counts I and II arose as a matter of state law, and would have existed even if there were no collective bargaining agreement.

THE COURTS BELOW ERRED IN DISMISSING COUNTS I AND II OF THE COMPLAINT

The dismissal of Counts I and II of the Sluders' Complaint as preempted by Section 301 was ordered by the District Court pursuant to a Motion to Dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure filed by the Union. This Motion was filed (and granted) before any Answer to the Sluders' Complaint was filed. No matters outside the Sluders' Complaint were presented to the District Court on the Motion to Dismiss which would, under Rule 12(b), permit the Motion to be treated as a motion for summary judgment and disposed of as provided in Rule 56 of the Federal Rules of Civil Procedure. The only pleading before the District Court on this Motion to Dismiss was the Sluders' Complaint and, under Rule 12(b)(6), the allegations of Counts I and II must be taken as true for purposes of the Union's Motion to Dismiss.

It is basic hornbook law that a complaint may not be dismissed for failure to state a claim under Rule 12(b)(6) unless it appears *beyond doubt* and to a *certainty* that the plaintiff can prove no set of facts in support of his claim which would entitle him to *any* relief. Put another way, Counts I and II of the Sluders' Complaint may not be dis-

missed under Rule 12(b)(6) unless there is absolutely *no possibility* that the Sluders' can recover anything under any *conceivable* set of facts provable under those Counts. *Hishon v. King & Spaulding*, 467 U.S. 69 (1984); *Cruz v. Beto*, 405 U.S. 319 (1972); *Conley v. Gibson*, 355 U.S. 41 (1957). Thus, the "facts" before this Court for purposes of reviewing the dismissal of Counts I and II of the Sluders' Complaint are those facts alleged in Counts I and II and any conceivable set of facts provable thereunder.

Given the foregoing, it is incomprehensible how the District Court could dismiss Counts I and II on a motion under Rule 12(b)(6) without knowing *any* of the facts which the Sluders intended to prove under those Counts. As this Court observed in *Lingle*, the resolution of state law tort claims typically hinges upon purely factual questions pertaining to the actual conduct of the parties. 486 U.S. at 407. The Court of Appeals in the present case noted that, under the state law theory advanced by the Sluders in Counts I and II, the scope of the duty assumed by the Union towards Sluder is determined by the extent of the actual undertaking of the Union in its safety inspection of the mine. As already noted herein, the determination of the extent of that undertaking is a purely *factual* inquiry, depending upon what *actually* took place during the inspection on July 31, 1986. While the dismissal of Counts I and II might be conceivable when the court has some facts before it on a motion for summary judgment under Rule 56, the dismissal of those Counts when the court has no facts before it on a motion to dismiss under Rule 12 (b)(6) is at least premature.

Even more glaring is the fact, as pointed out by the Sluders in their briefs and at oral arguments in the Court of Appeals, that the District Court did not even have a full copy of the collective bargaining agreement before it when it dismissed Counts I and II. It is beyond comprehension how the District Court could hold, in granting the Union's Motion to Dismiss Counts I and II under Rule 12(b)(6), that there was absolutely no set of facts provable under those

Counts by which the Sluders could establish that the union undertook and assumed *any* duty to Sluder outside the preemptive scope of the collective bargaining agreement, without even having a copy of that collective bargaining agreement before it.

It is in this respect that the present case is clearly distinguishable even from the *Rawson* case pending before this Court on certiorari. In *Rawson*, the Idaho Supreme Court was reviewing the grant of *summary judgment* in favor of the union. 111 Idaho 630, 726 P.2d 742. There the court had before it some facts by which to determine the actual extent of the undertaking of the union in delineating the scope of the duty assumed by the union in its safety inspection. In the present case, the District Court and the Court of Appeals had before them no such facts in dismissing Counts I and II of the Sluders' Complaint on a motion under Rule 12(b)(6).[2]

In its opinion in the present case, the Court of Appeals held that Counts I and II of the Sluders' Complaint were preempted by Section 301 because reference to the collective bargaining agreement was necessary to determine the scope of the Union's duty to Sluder. 892 F.2d at 554. To the extent that this holding implies the existence of some duty owed by the Union to Sluder under the collective bargaining agreement, it is in conflict with the decision of another United States Court of Appeals. In *Bryant v. United Mine Workers*, 467 F.2d 1 (6th Cir. 1972),

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[2] In its opinion, the Court of Appeals appears to have glossed over this egregious error by itself purporting to review a copy of the collective bargaining agreement in the record which was attached to the Answer filed by the Union *after* the District Court had already dismissed Counts I and II of the Sluders' Complaint. 892 F.2d at 555, n.8. In effect, the Court of Appeals *sua sponte* and for the first time on appeal considered matters outside of the pleadings as if treating the Union's Motion to Dismiss under Rule 12(b) as a motion for summary judgment, without allowing the Sluders their corresponding right under Rule 56 to submit evidence which might show that the Union undertook and assumed duties to Sluder outside the scope of the collective bargaining agreement.

cert. denied, 410 U.S. 930 (1973), the Sixth Circuit held that the National Bituminous Coal Wage Agreement of 1950, as amended, did not create any duties on the part of the United Mine Worker of America respecting mine safety. In their Motions to Dismiss Count III of Sluder's Complaint, the Unions vigorously argued that the "Mine Safety Program" provisions of that collectively bargaining agreement were virtually identical to those in the National Bituminous Coal Wage Agreement of 1984 involved in the present case. If, as held by the Sixth Circuit in *Bryant* and so urgently argued by the Unions in this case, the collective bargaining agreement created no duties on the part of the Union respecting mine safety, then it is plainly anomalous for the Court of Appeals in this case to hold that Counts I and II of the Sluders' Complaint were preempted by Section 301 because reference to the collective bargaining agreement was necessary to define the scope of the Union's duty. The Union simply can't have it both ways.

CONCLUSION

On the basis of the arguments and authorities cited herein, the Petitioners Terry Ray Sluder and Tina Sluder submit that a Writ of Certiorari should issue.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TERRY RAY SLUDER and TINA SLUDER, Plaintiffs-Appellants, vs. UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION; UNITED MINE WORKERS OF AMERICA, DISTRICT 12; JOHN DOE; and TOM ROE; Defendants-Appellees.	)	CASE NO. 88-2910

Appeal from the United States District Court for the
Central District of Illinois, Springfield Division.
No. 87-3086—Richard Mills, Judge.

ARGUED APRIL 4, 1989—
DECIDED DECEMBER 22, 1989

Before COFFEY, FLAUM, and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Terry Ray Sluder and Tina Sluder filed a three-count complaint against District 12 of the United Mine Workers of America, among others, for the personal injuries Mr. Sluder sustained when a wall collapsed in the coal mine where he was working. The district court concluded that resolution of two of the Sluders' counts required interpretation of the collective bargaining agreement that governed the terms of Mr. Sluder's employment. For this reason, the district court found that the claims were preempted by section 301 of the Labor Man-

agement Relations Act of 1947 (LMRA), 29 U.S.C. §185[1] and subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(6). The remaining count was dismissed with prejudice voluntarily by the Sluders. For the following reasons, we affirm the judgment of the district court.

I
BACKGROUND

A. *Facts*

Terry Ray Sluder was a coal miner employed by AMAX Coal Company (AMAX) at its Wabash Mine in Keensburg, Illinois. Mr. Sluder was a member of the United Mine Workers of America, District 12 (District 12). The terms of his employment with AMAX were governed by a collective bargaining agreement known as the National Bituminous Coal Wage Agreement of 1984. Mr. Sluder alleges that on July 31, 1986, and on prior occasions, "District 12, by and through its agents John Doe and/or Tom Roe, undertook to make inspections as to safety practices at the Wabash Mine in Keensburg, Illinois, which inspections included, but were not limited to, checking for proper placement of rib bolts at said coal mining facility." R.25 at 1-2.[2] Moments after the inspectors completed their inspection, the mine wall in the area where Mr. Sluder was working collapsed. Mr. Sluder was paralyzed as a result of the accident.

B. *Procedural History*

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[1] Section 301 of the LMRA provides in relevant part:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties. . . .

29 U.S.C. §185(a).

[2] Rib bolts are devices secured to the walls of an underground coal mine to provide structural support in order to prevent the mine walls from collapsing. Appellants' Br. at 8.

On November 24, 1986, Mr. Sluder and his wife filed a two-count complaint in the Circuit Court of the Seventh Judicial Circuit of Sangamon County, Illinois (cause No. 86-L-464) against District 12 and two unknown defendants, John Doe and Tom Roe, agents of District 12. On January 26, 1987, the plaintiffs filed an amended complaint that added both a third count and the International Union as a new defendant. Count I alleged that District 12, by and through its agents, undertook to make safety inspections of the coal mine where Mr. Sluder worked. It further alleged that District 12, by undertaking these inspections became subject to the state common-law duty to perform these inspections with due care. Negligence in performing such inspections, the allegation continued, resulted in the collapse of the mine wall and caused serious personal injury to Mr. Sluder. Count II alleged that Mrs. Sluder had suffered the loss of her husband's services and that she had been deprived of his affection, society, companionship, and consortium. Count III alleged that both the International Union and District 12 breached a duty of fair and adequate representation under section 301 of the LMRA by failing to perform and enforce certain provisions of the collective bargaining agreement on Mr. Sluder's behalf.

On January 27, 1987, the Sluders filed a second complaint (cause No. 87-L-32) in the same court. The complaint in cause No. 87-L-32 was identical to the amended complaint in cause No. 86-L-464. On February 25, 1987, the union filed a petition for removal of both state court actions to the United States District Court for the Central District of Illinois. The two state complaints were consolidated in the district court into one case, cause No. 87-3086. The Sluders neither objected to removal nor moved to remand the case to state court. On March 4, 1987, the International Union filed its motion to dismiss Count III of the Sluders' complaint. Two weeks later, District 12 moved to dismiss all three counts.

The case was referred to a magistrate. On February 18, 1988, the magistrate recommended that the district court dismiss Counts I and II of the Sluders' complaint as preempted by section 301 of the LMRA, but that Count III not be dismissed. *Sluder v. United Mine Workers of America,* No. 87-3086, Magistrate's Recommendation at 7 (C.D. Ill. Feb. 18, 1988); R.27 [hereinafter Recommendation]. On March 7, 1988, the district court adopted the Recommendation without change. *Sluder v. United Mine Workers of America,* No. 87-3086, Order at 1 (C.D. Ill. March 7, 1988); R.31. The Sluders then moved for a final dismissal order under Fed. R. Civ. P. 54(b) or, in the alternative, for an order permitting an interlocutory appeal under 28 U.S.C. §1292(b). The district court denied this motion on June 10, 1988. In order to proceed with an immediate appeal of the dismissals of Counts I and II, the Sluders moved for dismissal of Count III with prejudice and for entry of final judgment. On August 30, 1988, the district court dismissed Count III and entered an order of final judgment. On September 27, 1988, the Sluders filed a timely notice of appeal.[3]

C. *District Court Opinion*

The district court adopted the magistrate's reasoning as its own.[4] The magistrate had noted that, although the Sluders had not moved to remand the case to state court, it was the district court's responsibility to determine whether it had jurisdiction. The magistrate concluded that "[a] *de novo* review of plaintiffs' claims establishes that their complaints arise under federal law (29 U.S.C. §185) and removal is proper." Recommendation at 3.

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[3] Because the Sluders made a strategic decision to dismiss Count III with prejudice as a means to finalize the order dismissing Counts I and II, the dismissal of Count III is not being appealed. The only defendants named in Counts I and II were District 12, John Doe, and Tom Roe. Consequently, although the notice of appeal also indicates an appeal against the International Union, this union was not a named defendant in Counts I or II and thus is not a party to this appeal.

[4] The court also granted the Sluders thirty days to file an amended complaint. The record reveals that no amended complaint was filed.

The magistrate examined both parties' arguments. Citing *McColgan v. United Mine Workers of America*, 464 N.E.2d 1166 (Ill. App. Ct. 1984), *cert. denied*, 470 U.S. 1051 (1985), District 12 alleges that "as a matter of Illinois law, it owed no duty arising under common law tort [the Sluders] for alleged wrongs" in the inspection of the mine. Recommendation at 3-4. District 12 further argued that the Sluders' "so-called tort action was merely a novel attempt to avoid the exclusive remedy provisions of the Illinois Workers Compensation Act." *Id.* at 4. Finally, District 12 argued that "such so-called tort causes were in actuality the 'artful pleading' of a federal case couched in terms of state law which sought to avoid the preemptive scope of Section 301." *Id.* By contrast, the Sluders argued that the "complained-of activity—which they characterize as the negligent performance of a voluntarily assumed duty[,] citing *Nelson v. Union Wire Rope Corp.*, 199 N.E.2d 769 (Ill. 1964)—states a valid tort cause of action arising wholly independently of obligations imposed by the collective bargaining agreement." *Id.*

The magistrate concluded that a review of the complaint "conclusively establish[es] that plaintiffs' basis for duties alleged in Counts I and II arise[s] from obligations devolved by the collective bargaining agreement." *Id.*[5] The magistrate concluded that "[p]laintiffs[']' 'artfully pled' claims are 'inextricably intertwined' with a construction of the collective bargaining agreement and thus preempted

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[5] The magistrate cited the plaintiffs' memorandum in opposition to District 12's motion to dismiss which stated that:

"[T]he Complaint alleges that this Defendant failed to report the unsafe condition, failed to warn Plaintiff Terry Sluder and failed to close the mining facility, all of which it was legally and *contractually obligated* to do. . . . Even assuming, arguendo, that the inspection that the union did perform before the mine collapse was 'voluntary' as opposed to mandatory, once undertaken, *the collective bargaining agreement required it to warn plaintiff Terry Sluder, to report the safety violation and to close the mine.* Thus, the scope of the duty is clearly defined."

Recommendation at 4-5 (quoting Plaintiffs' Mem. at 2-3 [R.16 at 2-3]) (emphasis supplied by the magistrate).

by Section 301 of the Labor Management Relations Act." *Id.* at 5.

II
DISCUSSION

On appeal, we must decide whether the Sluders' claims set forth in Counts I and II of the complaint are preempted by section 301 of the LMRA.

A. *Submissions of the Parties*

The Sluders alleged that District 12, through its agents, conducted a negligent inspection of the mine. In the Sluders' view, these counts allege a "state law negligence claim for breach of a state common law duty assumed and undertaken by [District 12] when it performed the safety inspection" of the mine. Appellants' Br. at 10. They further submit that the assumed duty did not arise out of the collective bargaining agreement, but, instead, arose by operation of law after District 12 assumed and undertook the duty to inspect the mine.

District 12 acknowledges the legal principle, well established in Illinois law, that liability may arise from the negligent performance of a voluntary undertaking. *See Nelson v. Union Wire Rope Corp.*, 199 N.E.2d 769, 773 (Ill. 1964). However, it notes that the scope of the duty owed by the tortfeasor is limited to the extent of the undertaking. *Pippin v. Chicago Hous. Auth.*, 399 N.E.2d 596, 599 (Ill. 1979). In order to determine the scope of that undertaking, District 12 maintains that it is necessary to interpret the collective bargaining agreement. This necessity for reference to the agreement, concludes District 12, triggers the preemptive effect of section 301.

B. *The Mandate of Lingle*

1.

Our disposition of this matter must be governed by the Supreme Court's holding in *Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988). The mandate of *Lingle* is straightforward: "an application of state law is preempted by §301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective-bargaining agreement." *Id.* at 1885. As we noted in *Douglas v. American Information Technologies Corp.*, 877 F.2d 565, 569 (7th Cir. 1989):

> This approach is straightforward because the policy concern requiring preemption in the section 301 context is also straightforward. Federal labor policy mandates that uniform federal law be the basis for interpreting collective bargaining agreements. This policy reduces the possibility "that individual contract terms might have different meanings under state and federal law." *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103, 82 S.Ct. 571, 577, 7 L.Ed.2d 593 (1962). Conflicting interpretations of contract terms "would inevitably exert a disruptive influence" on the collective bargaining process. *Id.*

However, as we also noted in *Douglas:*

> [F]ederal labor policy does not prevent states from providing workers with substantive rights independent of the collective bargaining relationship. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212, 105 S.Ct. 1904, 1912, 85 L.Ed.2d 206 (1985). Indeed, in *Lingle*, the Court made it clear that, so long as a state-law

> claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for the purposes of section 301. 108 S.Ct. at 1883. Thus, "§301 pre-empts state law only insofar as resolution of the state-law claim requires the interpretation of a collective-bargaining agreement." *Id.* at 1883 n. 8. The mere fact that the state-law analysis might require the state court to focus on the same facts that would control resolution of an employee's contractual remedy is not enough to require preemption of the state-law claim. *Id.* at 1883. If adjudication of the state-law claim does not require a court to interpret any term of a collective bargaining agreement, then that state-law claim is not preempted by section 301. *See id.* at 1881-82 (analysis of the elements of Illinois tort of retaliatory discharge does not require court to interpret collective bargaining agreement).
>
> *Id.* at 569-70 (footnote omitted).

2.

According to the methodology established in our post-*Lingle* cases,[6] our next step must be to analyze the state-based cause of action for negligence so that we may later determine whether adjudication of such a claim would require an interpretation of the collective bargaining agreement. On several recent occasions, this court has examined the Illinois law governing the imposition of liability for a voluntary undertaking. We have noted that "[u]nder controlling Illinois law, liability may arise from the negligent performance of a voluntary undertaking."

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[6] *See Marzuki v. AT&T Technologies, Inc.*, 878 F.2d 203 (7th Cir. 1989); *Nelson v. Central Illinois Light Co.*, 878 F.2d 198 (7th Cir. 1989); *Bettis v. Oscar Mayer Foods Corp.*, 878 F.2d 192 (7th Cir. 1989); *Douglas v. American Information Technologies Corp.*, 877 F.2d 565 (7th Cir. 1989).

Homer v. Pabst Brewing Co., 806 F.2d 119, 121 (7th Cir. 1986) (citing *Pippin v. Chicago Hous. Auth.*, 399 N.E.2d 596 (Ill. 1979), and *Nelson v. Union Wire Rope Corp.*, 199 N.E.2d 769 (Ill. 1964)). However, we have stressed that "the scope of the duty is limited by the extent of the undertaking." *Id.* (citing *McColgan v. United Mine Workers*, 464 N.E.2d 1166 (Ill. App. Ct. 1984)). "Illinois courts have carefully examined the nature of a defendant's undertaking, imposing a duty only to the extent actually assumed by the defendant." *Id.* Indeed, Illinois courts "require that any duty assumed be limited *strictly* to the scope of the undertaking." *Figueroa v. Evangelical Covenant Church*, 879 F.2d 1427, 1435 (7th Cir. 1989) (emphasis supplied).

"Under the common law . . . it is the *employer*, not a labor union, that owes employees a duty to exercise reasonable care in providing a safe workplace." *IBEW, AFL-CIO v. Hechler*, 481 U.S. 851, 859 (1987) (emphasis in original); *see* W. Prosser & W.P. Keeton, Torts §80 at 569 (5th ed. 1984).[7] It is, of course, possible that a third party, such as District 12, might assume this duty. However, before liability could be established, it would be necessary to establish that the union breached a specific duty it had assumed toward the employees. In order to define the scope of the duty assumed by the union, it would be necessary to establish the precise responsibility assumed by the union.

3.

In our view, it would not be possible to define, with the precision demanded by Illinois law, the scope of the union's duty without reference to the collective bargaining agreement that governs the relationship between the company and the union. Indeed, the necessity for such a reference is evident from the complaint itself. One of the specific acts of negligence attributed to District 12 by the Sluders

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[7] Prosser and Keeton cite a Supreme Court of Illinois case in which Illinois employed this common law approach. *See* W. Prosser & W.P. Keeton, Torts §80 at 569 n.3 (5th ed. 1984) (citing *Armour v. Golkowska*, 66 N.E. 1037, 1038 (Ill. 1903)).

was that the union "[c]arelessly and negligently failed to close said mining facility in light of its unreasonably dangerous condition." R.25 at 2. The union's authority to close the employer's facility is, of course, not a right granted by law but, if at all, by the collective bargaining agreement. The collective bargaining agreement and the dispute resolution process established under that agreement set forth the circumstances under which such action by the union would be permitted. Indeed, Count III, which was dismissed voluntarily by the Sluders, contains extensive abstracts of the collective bargaining agreement that make it quite evident that District 12's right to inspect the mine and to deal with the employer with respect to safety deficiencies is a major concern of that agreement. There, the rights and responsibilities of both employer and employee with respect to mine safety are set forth in detail. The collective bargaining agreement outlines not only the union's responsibility with respect to the two mine safety committees but also limits District 12's right to interfere in the operation of the mine.

As we noted extensively in *Nelson v. Central Illinois Light Co.*, 878 F.2d 198 (7th Cir. 1989), the Supreme Court in *Lingle* "pointedly acknowledged that 'state-law analysis might well involve attention to the same factual considerations as the contractual determination.'" *Id.* at 202 (quoting *Lingle,* 108 S. Ct. at 1883). However, the Supreme Court also noted in *Lingle* that it does not follow "that such parallelism renders the state-law analysis dependent upon the contractual analysis." 108 S. Ct. at 1883. Preemption under section 301 "merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements." *Id.* at 1883. Here, delineation of District 12's duty would require more than the resolution of factual disputes. Unlike the "purely factual" claims in *Lingle,* the question of duty in this case is one of law and is open to varying interpretations under the collective bargaining

agreement.[8] Indeed, our situation is not at all dissimilar from that facing the Supreme Court in *IBEW, AFL-CIO v. Hechler,* 481 U.S. 851 (1987). There, a worker had brought suit against her union in state court, alleging that the union had breached its duty to ensure that she received essential training. In determining that her claim was pre-empted by section 301, the Supreme Court noted that:

> In order to determine the Union's tort liability, however, a court would have to ascertain, first, whether the collective-bargaining agreement in fact placed an implied duty of care on the Union to ensure that Hechler was provided a safe workplace, and, second, the nature and scope of that duty, that is, whether, and to what extent, the Union's duty extended to the particular responsibilities alleged by respondent in her complaint. . . . The need for federal uniformity in the interpretation of contract terms therefore mandates that here, as in *Allis-Chalmers [Corp. v. Lueck,* 471 U.S. 202 (1985)], respondent is precluded from evading the pre-emptive force of §301 by casting her claim as a state-law tort action.

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[8] The complaint indicates that the International Union and District 12 are both bound by the National Bituminous Coal Wage Agreement of 1984. At oral argument, appellants' counsel asserted that the district court decided that Counts I and II were preempted by section 301 without the benefit of having the entire collective bargaining agreement before it. However, before the district court rendered a final judgment after dismissing Count III, the union filed a third-party complaint against AMAX, Mr. Sluder's employer, seeking contribution should International be found liable to the Sluders. The union attached a copy of the collective bargaining agreement to support its claim that AMAX was equally liable under the agreement for any breach of duty owed to Mr. Sluder. It is appropriate for us to refer to the agreement as a matter of common sense and judicial economy. *See Marzuki v. AT&T Technologies,* 878 F.2d 203, 207 (7th Cir. 1989).

Id. at 862.[9] In short, if not preempted by section 301, these claims could increase the possibility that "individual contract terms might have different meanings under state and federal law." *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). Such conflicting interpretations of contract terms "would inevitably exert a disruptive influence" on the collective bargaining process. *Id.*

4.

As we have noted, the allegations set forth in Counts I and II of the complaint can be resolved only by defining the precise nature of the duty assumed by District 12, and that duty can be defined only by reference to the collective

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[9] In *Hechler*, the worker suggested on appeal that, under state law, the Union had an independent responsibility to the worker "by virtue of its relationship with its members, rather than as a result of the collective bargaining agreement." 481 U.S. at 863 n.5. While declining to rule on "the impact of hypothetical state law," *id.* at 864 n.5, the Court appeared to express skepticism that such a claim could survive a preemption challenge. It seems clear that, in Illinois, the union's duty is defined by the collective bargaining agreement. *McColgan v. United Mine Workers*, 464 N.E.2d 1166 (Ill. App. Ct. 1984), *cert. denied*, 470 U.S. 1051 (1985).

We are aware that the Supreme Court of Idaho addressed the same issue in *Rawson v. United Steel Workers of America*, 770 P.2d 794 (Idaho), *petition for cert. filed*, No. 89-322, 58 U.S.L.W. 3154 (Aug. 24, 1989). While the particulars of the collective bargaining arrangement and of the content of Idaho state law are not entirely clear, it appears that, by a divided vote, the Idaho court resolved this issue contrary to the approach taken by us. Assuming that neither the facts nor the applicable state law permits a principled distinction between the cases, we respectfully disagree. In our view, the dissenting opinion of Justice Bakes reflects a more accurate reading of *Hechler* and *Lingle*. It recognizes that, because the union's duty must be defined by reference to the collective bargaining agreement, preemption of the state cause of action is required. *Rawson*, 770 P.2d at 798 (Bakes, J., dissenting). Indeed, in an earlier opinion, before remand from the Supreme Court of the United States for reconsideration in light of *Hechler*, the Idaho majority explicitly had noted that the provisions of the collective bargaining agreement defined the nature and scope of the union's duty. *Rawson v. United Steel Workers of America*, 726 P.2d 742, 752 (Idaho 1986), *vacated on other grounds*, 482 U.S. 901 (1987). As we note in the text, this determination requires, in our view, a conclusion that the claim is preempted.

bargaining agreement. "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392 (1987); *see also Gully v. First Nat'l Bank,* 299 U.S. 109, 112-13 (1936). As the Supreme Court has explained, "[t]he rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar,* 482 U.S. at 392. In cases raising claims under section 301 of the LMRA, the Supreme Court employs an independent corollary to the well-pleaded complaint rule known as the "complete pre-emption" doctrine. *Id.* at 393. As this court recently noted in *Douglas v. American Information Technologies Corporation,* 877 F.2d 565, 568-69 (7th Cir. 1989) (footnote and citation omitted),

> [T]he preemptive force of section 301 " 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.' " [*Caterpillar,* 482 U.S. at 393] (quoting *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 65, 107 S.Ct. 1542, 1546, 95 L.Ed.2d 55 (1987)). As the Supreme Court explained in *Caterpillar,* "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.*... Thus, state-law claims preempted by section 301 are properly removable to federal court despite a plaintiff's failure to plead explicitly a federal cause of action. *See Lingle,* 108 S.Ct. at 1881 n. 5.

The plaintiffs cannot escape the application of these principles and " 'deny a defendant his right to a federal forum by artfully disguising an essentially federal law

claim in terms of state law.'" *Oglesby v. RCA Corp.*, 752 F.2d 272, 275 (7th Cir. 1985) (quoting *Nuclear Engineering Co., Inc. v. Scott*, 660 F.2d 241, 249 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982)).

Under the usual application of these principles, a determination that the plaintiff had stated a federal cause of action under section 301 of the LMRA would result in the denial of a motion to remand, and the case would remain in federal court, although subject to dismissal for failure to exhaust administrative remedies. *See Douglas v. American Information Technologies Corp.*, 877 F.2d 565, 573-74 (7th Cir. 1989). Here, however, the plaintiffs, apparently as a tactical maneuver in order to obtain a final judgment, voluntarily dismissed with prejudice their section 301 claim. Under these circumstances, Counts I and II of the Sluders' complaint, which also states a claim under section 301, ought to be dismissed with prejudice as well. Accordingly, the judgment of the district court is affirmed.

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

TERRY RAY SLUDER, and TINA SLUDER, Plaintiffs, v. UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION, and UNITED MINE WORKERS OF AMERICA, DISTRICT 12, JOHN DOE, and TOM ROE, Defendants.	)	CASE NO. 87-3086
UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION, Third-Party Plaintiff, v. AMAX COAL COMPANY, Third-Party Defendant.	)	

JUDGMENT ENTRY

This matter came before the Court on Plaintiffs' Motion to Dismiss Count III and for Entry of Final Judgment.

And the Court, having considered said Motion and being duly advised in the premises, now finds that said Motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Count III of Plaintiffs' Complaint in this action be, and hereby is, dismissed with prejudice.,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court's March 7, 1988 Order Adopting Magistrate's Recommendations in this action dismissing Counts I and II of Plaintiffs' Complaint be, and hereby is, made final.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Third-party Complaint of Defendant United Mine Workers of America, International Union, against Third-Party Defendant Amax Coal Company be, and hereby is, dismissed without prejudice.

8-30-88	/s/ Richard Mills
DATE	JUDGE, United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

TERRY RAY SLUDER and	)	CASE NO.
TINA SLUDER,	)	87-3086
Plaintiffs,	)	
v.	)	
UNITED MINE WORKERS OF	)	
AMERICA, et al.,	)	
Defendants.	)	

ORDER ADOPTING MAGISTRATE'S RECOMMENDATIONS

MILLS, District Judge:

The recommendations, and able reasons therefor, of United States Magistrate Charles H. Evans, filed herein on February 18, 1988, are adopted by the Court and will be followed.

Pursuant to 28 U.S.C. §636(b)(1), the Court has made a *de novo* review of the objections to the Magistrate's recommendation filed herein and after careful consideration finds them to be both a re-argument of matters already presented to the Magistrate, and without merit. Under the reasoning of *IBEW v. Heckler,* 107 S.Ct. 2161 (1987), and *Lingle v. Norge Magic Chef,* 823 F.2d 1031 (7th Cir. 1987), Counts I and II of the Complaint are preempted by 29 U.S.C. §301.

Ergo, District 12's motion to dismiss is ALLOWED as to Counts I and II of the Complaint. Plaintiffs are given thirty (30) days to file an amended complaint. International Union's motion to dismiss Count III is DENIED.

SO ORDERED.

ENTER: March 7, 1988.

FOR THE COURT:

/s/ Richard Mills
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

TERRY RAY SLUDER and	)	CASE NO.
TINA SLUDER,	)	87-3086
Plaintiffs,	)	
v.	)	
UNITED MINE WORKERS OF	)	
AMERICA,	)	
UNITED MINE WORKERS OF	)	
AMERICA, DISTRICT 12,	)	
JOHN DOE and	)	
TOM ROE,	)	
Defendants.	)	

RECOMMENDATION

This recommendation is being submitted pursuant to Rule 3, (A)(7) of the Rules of the United States District Court for the Central District of Illinois.

I.
Procedural Posture of Litigation

On January 26, 1987, plaintiffs filed a document captioned Amended Complaint in cause no. 86-L-464 in the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois. On January 27, 1987, plaintiffs filed an identical complaint denominated as Complaint in cause no. 87-L-32. Counts I and II of these complaints sought to state a cause of action arising under Illinois common law tort for alleged negligent failures in making safety inspections by defendant United Mine Workers of America, District 12 at Amax Coal Company Mine, Keensburg, Illinois, seeking relief in Count I for injuries to Terry Ray Sluder and in Count II for loss of consortium to his wife Tina Sluder.

Count III of these complaints attempted to state a cause of action for breach of the duty of fair representation against defendants District 12, United Mine Workers of America and International Union, United Mine Workers of America allegedly arising from the arbitrary, capricious, and discriminatory failures of the defendants to enforce certain provisions of the collective bargaining agreement existing between these defendants and Amax Coal Company which operated the coal mine where plaintiff Terry Ray Sluder was employed by Amax Coal Company. On February 25, 1987, defendants District 12, United Mine Workers of America and International Union, United Mine Workers of America filed their Petition for Removal of these causes in the United States District Court for the Central District of Illinois—Springfield Division, alleging that the complaints arose under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, and stated a claim arising under laws of the United States subject to removal pursuant to 28 U.S.C. §1441(b). Plaintiffs have not filed objections to the removal or a motion to remand to State court.

Defendant International Union filed a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss Count III of Complaint directed at it and defendant District 12 filed its Fed. R. Civ. P. 12(b)(6) Motion to dismiss Counts I, II, and III of Complaint directed at it. Plaintiffs filed their Memorandum in Opposition to Motion of defendant International Union and to the motion of defendant District 12. Thereafter, both District 12 and plaintiffs filed additional submissions of authority with the court discussing the recent holding of the United States Supreme Court in *International Brotherhood of Electrical Workers v. Hechler*, 107 S. Ct. 2161, (May 26, 1987). Arguments upon these motions were heard by the Court.

II.
Removal Jurisdiction

As noted earlier, plaintiffs have never moved to remand. However, as our Court of Appeals has recently held in *Lingle v. Norge Magic Chef*, (7th Cir. 6/23/87):

> A federal court must first determine whether it has jurisdiction. In a case originally brought in a state court, this requires the federal court to determine whether the suit was properly removed. Then, and only then, may a court determine whether or not federal law preempts the state cause of action.

The *Lingle* Court held that a complaint alleging a retaliatory discharge tort cause of action was properly removed utilizing the "artful pleading doctrine" that a plaintiff may not purposely frame his or her action under state law and omit the federal questions that are essential to recovery. And so it is here, plaintiffs may not avoid invoking a Section 301 breach of contract jurisdiction by characterizing their claims as common law negligence tort actions. A *de novo* review of plaintiffs' claims establishes that their complaints arise under federal law (29 U.S.C. §185) and removal is proper.

III.
Motion to Dismiss Counts I and II

District 12 attacked Counts I and II on the grounds that as a matter of Illinois law, it owed no duty arising under common law tort to plaintiff for alleged wrongs citing *McColgan v. United Mine Workers of America*, 120 Ill.App.3d 825, 80 Ill. Dec. 183, 464 N.E.2d 1166 (1st Dist. 1984). The District further argued that plaintiffs' so-called tort action was merely a novel attempt to avoid the exclusive remedy provisions of the Illinois Workers Compensation Act which if permitted would require unions in all cases to bring third party actions for contribution against the employer who is legally responsible for workplace safety. Finally, the District argued that such so-called tort causes were in actuality the "artful pleading" of a federal case couched in terms of state law which sought to avoid the preemptive scope of Section 301 of the Labor Management Relations Act.

Plaintiffs argue that the complained-of activity—which they characterize as the negligent performance of a voluntarily assumed duty citing *Nelson v. Union Wire Rope Corp.*, 31 Ill.2d 69, 199 N.E.2d 769 (1964)—states a valid tort cause of action arising wholly independently of obligations imposed by the collective bargaining agreement. However, a review of the allegations made in Counts I and II with those of Count III conclusively establish that plaintiffs' basis for duties alleged in Counts I and II arise from obligations devolved by the collective bargaining agreement. See plaintiffs Memorandum in Opposition to District 12 Motion to Dismiss:

> [T]he Complaint alleges that this Defendant failed to report the unsafe condition, failed to warn Plaintiff Terry Sluder and failed to close the mining facility, all of which it was legally and *contractually obligated* to do .... Even assuming, arguendo, that the inspection that the union did perform before the mine collapse was "voluntary" as opposed to mandatory, once undertaken, *the collective bargaining agreement required it to warn plaintiff Terry Sluder, to report the safety violation and to close the mine.* Thus, the scope of the duty is clearly defined.

(Plaintiffs Memorandum at pp. 2-3, emphasis added). Plaintiffs "artfully pled" claims are "inextricably intertwined" with a construction of the collective bargaining agreement and thus preempted by Section 301 of the Labor Management Relations Act. See *Allis-Chalmers v. Lueck*, 471 U.S. 202, 105 S. Ct. 1904, (1986); *IBEW v. Hechler*, 107 S. Ct. 2161, (1987); *Lingle v. Norge Magic Chef*, (7th Cir. 1987).

IV.
Motions to Dismiss Count III

Defendants District 12 and International Union, United Mine Workers of America have both moved to dismiss Count III of plaintiffs' Complaint that alleges they breached their duty of fair representation to plaintiff by arbitrarily, discriminatorily, and/or in bad faith failed to adequately compose and train a mine safety committee and failed to report and inspect alleged safety conditions at the mine resulting in injury to plaintiff.

Both defendants urge that plaintiffs have pled only conclusory allegations without any specific facts that are insufficient as a matter of law to establish a cause of action, citing *Williams v. General Food Corp.*, 492 F.2d 399 (7th Cir. 1974). Defendants further argue that plaintiffs do not plead intentional misconduct on their behalf which is a necessary element for a complaint alleging breach of duty to fairly represent, citing *United Independent Flight Officers v. United Airlines*, 756 F.2d 1274 (7th Cir. 1985); *Graff v. Elgin, Joliet and Eastern Railway Co.*, 697 F.2d 771 (7th Cir. 1983). Finally, defendants claim as a matter of law that the Union does not have a duty to plaintiff arising from the collective bargaining agreement requiring an inspection of the mine which would give rise to a cause of action for injuries here pled, citing *Bryant v. United Mine Workers*, 467 F.2d 1 (6th Cir. 1972) *cert. denied* 410 U.S. 910 (1973).

Plaintiffs respond that defendants' attack on the complaint is unwarranted given the Seventh Circuit's standard for pleading duty of fair representation claims in ruling on motions to dismiss. Plaintiffs cite *Orphan v. Furnco Construction Corp.*, 466 F.2d 795 (7th Cir. 1972), *Waters v. Wisconsin Steel Works*, 427 F.2d 476 (7th Cir. 1969), *cert. denied*, 400 U.S. 911 (1970); *Archie v. Chicago Truck Drivers Helpers and Warehouse Workers Union*, 585 F.2d 210 (7th Cir. 1978) and *Schultz v. Owens Illinois, Inc.*, 560 F.2d 849 (7th Cir. 1977) in support of their contention that under the Federal Rules, as long as the complaint

gives defendant fair notice of the ground of plaintiffs' claim it is legally sufficient. Plaintiffs are correct in this regard.

Count III of plaintiffs' complaints at paragraph 8 specifies in adequate detail nine separate grounds upon which the claim of arbitrary, discriminatory or bad faith represenation is based. It certainly cannot be said that under Rule 12(b)(6) it appears beyond doubt to a certainty that plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. As it is settled law that a complaint may not be dismissed unless there is no possibility that the plaintiff can recover anything under any conceivable set of facts provable under his complaint (*Hishon v. King and Spaulding*, 467 U.S. 69 (1984); *Cruz v. Beto*, 405 U.S. 319 (1972); *Conley v. Gibson*, 355 U.S. 41 (1957)) Count III of plaintiffs' complaints should not be dismissed upon grounds here urged.

ORDER

It is recommended that:

1.) District 12's Motion to Dismiss be granted as to Counts I and II and that plaintiffs be given thirty (30) days to file an Amended Complaint; and that the Motion To Dismiss as to Count III be denied.

2.) International Union's Motion to Dismiss be denied as to Count III.

Dated this 17th day of February, 1988.

/s/ Charles H. Evans
United States Magistrate

APPENDIX E

SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, 29 U.S.C. §185

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member of his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

APPENDIX F

IN THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

TERRY RAY SLUDER and TINA SLUDER, Plaintiffs, v. UNITED MINE WORKERS OF AMERICA, UNITED MINE WORKERS OF AMERICA, DISTRICT 12, JOHN DOE, and TOM ROE, Defendants.	))))))))))	CASE NO. 87-L 32

COMPLAINT

COUNT I

COMES NOW the Plaintiff Terry Ray Sluder, by counsel, and for Count I of his Complaint against the Defendants United Mine Workers of America, District 12, John Doe and Tom Roe, alleges and says that:

1. At all times relevant hereto, Plaintiff Terry Ray Sluder was a citizen of the State of Indiana, residing in Sullivan County, Indiana.

2. At all times relevant hereto, Defendant United Mine Workers of America, District 12 was a voluntary, unincorporated association with an office in Springfield, Illinois.

3. At all times relevant hereto, Defendants John Doe and Tom Roe were individual persons whose identities are unknown to Plaintiffs at the present time.

4. On July 31, 1986 and prior thereto, Defendant United Mine Workers of America, District 12, by and through its agents John Doe and/or Tom Roe, undertook to make inspections as to safety practices at the Wabash Mine in Keensburg, Illinois, which inspections included, but were not limited to, checking for proper placement of rib bolts at said coal mining facility.

5. On July 31, 1986, Plaintiff Terry Ray Sluder was a coal miner and was lawfully and properly at the coal mining facility at said Wabash Mine in Keensburg, Illinois.

6. Notwithstanding its undertaking and assumption of the duty to inspect for safety practices at the aforesaid facility, Defendant United Mine Workers of America, District 12 and its agents John Doe and/or Tom Roe were, on July 31, 1986, guilty of negligence in the performance of the said assumed duty in one or more of the following matters:

a.) Carelessly and negligently failed to detect the lack of proper placement of rib bolts in said coal mining facility;

b.) Carelessly and negligently failed to report the absence of rib bolts to the proper authorities;

c.) Carelessly and negligently failed to warn Plaintiff Terry Ray Sluder of the absence of said rib bolts and the imminent danger to himself caused thereby;

d.) Carelessly and negligently failed to close said mining facility in light of its unreasonably dangerous condition;

e.) Carelessly and negligently made or failed to make the said inspections so that as a direct and

proximate result thereof Plaintiff Terry Ray Sluder was injured.

7. As a direct and proximate result of one or more of the foregoing acts of negligence and in consequence thereof, a part of the mine wall collapsed onto Plaintiff Terry Ray Sluder, causing him to suffer a broken back and to become permanently disabled and to suffer continuous pain and inconvenience.

8. By reason of the foregoing acts, Plaintiff Terry Ray Sluder has been and will be prevented from attending to his vocation and has lost and will lose large amounts of wages and earnings; said Plaintiff has incurred and will in the future incur large medical and hospital expenses; said Plaintiff has in the past and will in the future endure great pain and suffering as a result of the aforesaid.

WHEREFORE, the Plaintiff Terry Ray Sluder prays judgment against the Defendants United Mine Workers of America, District 12, John Doe and Tom Roe in a sum in excess of $15,000.00 to compensate him for actual and compensatory damages and for his costs of suit, and DEMANDS TRIAL BY JURY.

COUNT II

COMES NOW the Plaintiff Tina Sluder, by counsel, and for her Complaint against the Defendants United Mine Workers of America, District 12, John Doe and Tom Roe, alleges and says that:

1-8. Plaintiff Tina Sluder adopts and incorporates herein by reference as though fully set forth herein rhetorical paragraphs 1 through 8, inclusive, of Count I of this Complaint.

9. Prior to and at the time of the occurrence complained of, Plaintiff Tina Sluder (wife) was the lawfully

wedded wife of the Plaintiff Terry Ray Sluder (husband), and as such was consorting and cohabiting with her said husband. As a direct and proximate result of the said negligent conduct of said Defendants toward Plaintiff's husband, he then and there sustained severe and permanent injuries as hereinbefore described, and Plaintiff Tina Sluder has lost the service of her said husband which, prior to his said injuries, had been of great value to her, and she has been deprived of his affection, society, companionship and consortium, as well as the services which her husband could and would have performed for her.

WHEREFORE, the Plaintiff Tina Sluder prays judgment against the Defendants United Mine Workers of America, District 12, John Doe and Tom Roe in a sum in excess of $15,000.00 to compensate her for actual and compensatory damages and for her costs of suit, and DEMANDS TRIAL BY JURY.

COUNT III

COMES NOW the Plaintiff Terry Ray Sluder, by counsel, and for Count III of his Complaint against the Defendants United Mine Workers of America and United Mine Workers of America, District 12, alleges and says that:

1. At all times relevant hereto, Plaintiff Terry Ray Sluder was a citizen of the State of Indiana, residing in Sullivan County, Indiana.

2. At all times relevant hereto, Defendant United Mine Workers of America was a voluntary, unincorporated association with an office in Springfield, Illinois, who was bound by a certain collective bargaining agreement known as the National Bituminous Coal Wage Agreement of 1984.

3. At all times relevant hereto, Defendant United Mine Workers of America, District 12, was a voluntary, unincorporated association with an office in Springfield, Illinois, who was bound by the terms of said collective bargaining agreement to the same extent as Defendant United Mine Workers of America.

4. At all times relevant hereto, Plaintiff Terry Ray Sluder was an employee of an employer who was bound by said collective bargaining agreement, and by reason thereof Plaintiff Terry Ray Sluder was a member of Defendants United Mine Workers of America and United Mine Workers of America, District 12 and entitled to the rights and benefits thereof under said collective bargaining agreement.

5. On July 31, 1986, Plaintiff Terry Ray Sluder was employed as a coal miner at the Wabash Mine in Keensburg, Illinois, which coal mining facility was covered by said collective bargaining agreement.

6. Said collective bargaining agreement provided, *inter alia*:

Article III — HEALTH AND SAFETY

Section (a) **Right to a Safe Working Place**

Every Employee covered by this Agreement is entitled to a safe and healthful place to work, and the parties jointly pledge their individual and joint efforts to attain and maintain this objective. Recognizing that the health and safety of the Employees covered by this Agreement are the highest priorities of the parties, the parties agree to comply fully with all lawful notices and orders issued pursuant to the Federal Mine Safety and Health Act of 1977, as amended, and pursuant to the various state mining laws.

* * *

Section (c) **Joint Industry Health and Safety Committee**

There shall be a joint Industry Health and Safety Committee composed of six members, three to be appointed by the Union, one of whom shall have special knowledge and expertise in coal mine health matters, and three to be appointed by the Employers, one of whom shall have special knowledge and expertise in coal mine health matters. . . .

Section (d) **Mine Health and Safety Committee**

(1) At each mine there shall be a Mine Health and Safety Committee made up of miners employed at the mine who are qualified by mining experience or training and selected by the local union. . . .

(2) The Union and Employer shall jointly establish and fund a course of health and safety training for members of the Mine Health and Safety Committee, which is designed to improve health and safety knowledge and skills. The Mine Health and Safety Committee shall participate in and shall be paid at their regular rates of pay by the Employer for attendance at training sessions. The training program will be established by the Joint Industry Training Committee.

(3) The Mine Health and Safety Committee may inspect any portion of a mine and surface installations, dams or waste impoundments and gob piles connected therewith. If the Committee

believes conditions found endanger the lives and bodies of the Employees, it shall report its findings and recommendations to the Employer. In those special instances where the Committee believes that an imminent danger exists and the Committee recommends that the Employer remove all Employees from the involved area, the Employer is required to follow the Committee's recommendation and remove the Employees from the involved area immediately.

7. Under said collective bargaining agreement, Defendants United Mine Workers of America and United Mine Workers of America, District 12 were the exclusive bargaining agents representing Plaintiff Terry Ray Sluder at said coal mining facility, and by reason thereof Defendants United Mine Workers of America and United Mine Workers of America, District 12 owed to Plaintiff Terry Ray Sluder a duty of fair and adequate representation.

8. Defendants United Mine Workers of America and United Mine Workers of America, District 12 breached their duty of fair and adequate representation to Plaintiff Terry Ray Sluder in one or more of the following particulars:

a.) Arbitrarily, discriminatorily and/or in bad faith failed to compose the Mine Health and Safety Committee at said coal mining facility with miners who were properly and adequately qualified by mining experience or training in accordance with the meaning and intent of said collective bargaining agreement;

b.) Arbitrarily, discriminatorily and/or in bad faith failed, through the Joint Industry Health and Safety Committee, to establish a proper and adequate course of health and safety training for members of the Mine Health and Safety Commit-

tee at said coal mining facility in accordance with the meaning and intent of said collective bargaining agreement;

c.) Arbitrarily, discriminatorily and/or in bad faith failed to properly and adequately train members of the Mine Health and Safety Committee at said coal mining facility in accordance with the meaning and intent of said collective bargaining agreement;

d.) Arbitrarily, discriminatorily and/or in bad faith failed, through the Mine Health and Safety Committee at said coal mining facility, to detect the lack of proper placement of rib bolts in said coal mining facility on July 31, 1986;

e.) Arbitrarily, discriminatorily and/or in bad faith failed, through the Mine Health and Safety Committee at said coal mining facility, to report the absence of rib bolts in said coal mining facility on July 31, 1986 to the proper authorities;

f.) Arbitrarily, discriminatorily and/or in bad faith failed, through the Mine Health and Safety Committee at said coal mining facility, to warn Plaintiff Terry Ray Sluder of the absence of said rib bolts and the imminent danger to himself thereby on July 31, 1986;

g.) Arbitrarily, discriminatorily and/or in bad faith failed, through the Mine Health and Safety Committee at said coal mining facility, to close said mining facility in light of its unreasonably dangerous condition on July 31, 1986;

h.) Arbitrarily, discriminatorily and/or in bad faith failed, through the Mine Health and Safety Com-

mittee at said coal mining facility, to inspect said coal mining facility on July 31, 1986;

i.) Arbitrarily, discriminatorily and/or in bad faith permitted a method of mining known L-slabbing at said coal mining facility, which said Defendants knew or should have known was unreasonably dangerous.

9. As a direct and proximate result of one of more of the foregoing acts and in consequence thereof, a part of the mine wall at said coal mining facility collapsed onto Plaintiff Terry Ray Sluder on July 31, 1986, causing him to suffer a broken back and to become permanently disabled and to suffer continuous pain and inconvenience.

10. By reason of the foregoing acts, Plaintiff Terry Ray Sluder has been and will be prevented from attending to his vocation and has lost and will lose large amounts of wages and earnings; said Plaintiff has incurred and will in the future incur large medical and hospital expenses; said Plaintiff has in the past and will in the future endure great pain and suffering as a result of the aforesaid.

WHEREFORE, the Plaintiff Terry Ray Sluder prays judgment against the Defendants United Mine Workers of America and United Mine Workers of America, District 12 in a sum in excess of $15,000.00 to compensate him for actual and compensatory damages and for his costs of suit, and DEMANDS TRIAL BY JURY.

TERRY RAY SLUDER and TINA SLUDER by their attorneys:

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by: /s/ Rodney V. Taylor
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